Nos. 08-289 & 08-294

IN THE

Supreme Court of the United States

THOMAS C. HORNE, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF ARIZONA, and SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES, *ET AL.*,

Petitioners,

v.

MIRIAM FLORES, *ET AL.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE ASIAN AMERICAN LEGAL DEFENSE & EDUCATION FUND, *ET AL.* AS AMICI CURIAE SUPPORTING RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. Asian American ELLs Face Challenges That Illuminate The Issues in This Case. 6

A. Asian American ELLs Face Challenges Common to All ELLs. 8

B. Asian American ELLs Also Face Certain Unique Challenges. 9

II. Operation Under NCLB's Limited Requirements Does Not Ensure Appropriate Action under the EEOA. 12

A. NCLB Requirements for Standards and Assessment Systems Have a Limited Focus and Do Not Address All Aspects of Education to Which the EEOA Broadly Applies 13

B. NCLB Does Not Provide a Reliable Benchmark for Measuring Whether Each Individual ELL Student is Receiving an Equal Educational Opportunity 15

1. NCLB Alone Fails to Ensure That Schools Meet Specific Needs of Discrete Populations of ELLs. 15

2. NCLB "Standards" Fail to Establish a Consistent, Universal Measure of the Appropriateness of State Education Plans Because States Set Their Own Benchmarks. 18

3. NCLB Assessments May Underestimate Educational Progress by ELLs in Some Cases and Overestimate It in Others. 23

C. EEOA Violations Have Occurred in Schools Are Operating Under NCLB. 24

1. EEOA Investigations by the DOJ Have Resulted in Consent Decrees Against and Settlements Involving Schools Operating Under NCLB. 25

2. There Also Are Documented Problems in Cases Outside the DOJ Enforcement Context. 27

D. The EEOA Protects the Rights of Individual ELL Students in Ways that NCLB Does Not. 35

CONCLUSION 39

APPENDIX 1a

TABLE OF AUTHORITIES

Page(s)

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INTEREST OF AMICI CURIAE

The Asian American Legal Defense and Education Fund ("AALDEF"), Advocates for Children of New York, Arizona Asian American Bar Association, Asian American LEAD, Asian Immigrant Women Advocates, Asian Law Alliance, Asian Pacific American Legal Resource Center, Asian Pacific Community in Action, Asian Pacific Islander Legal Outreach, Asian Pacific Islander Youth Promoting Advocacy and Leadership, Boston Chinatown Neighborhood Center, Cambodian Association of Greater Philadelphia, Center for Pan Asian Community Services, Inc., Chinese for Affirmative Action, Coalition for Asian American Children and Families, Detroit Asian Youth Project, Hmong American Partnership, Multi-Cultural Youth Project, National Korean American Service & Education Consortium, ONE Lowell, Providence Youth Student Movement, United Chinese Association of Brooklyn, Vietnamese American Young Leaders Association of New Orleans, and Washington Asian Pacific Islander Families Against Substance Abuse submit this brief as *Amici Curiae* in support of Respondents in this case.[1] All of the parties have consented to the filing of this brief.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

All of the *Amici* groups are nonprofit organizations whose mission is to advocate on behalf of or provide direct services to Asian American and other immigrant communities in various jurisdictions across the United States. Additionally, many *Amici* are members of the National Asian American Education Advocates ("NAAEA") Network, a consortium of youth groups and after-school providers serving immigrant Asian American youth as well as the children of Asian immigrants. The Appendix to this brief contains additional information about the *Amici*.

The geographic areas in which *Amici* work include a broad and representative cross-section of Asian American communities throughout the United States. San Francisco and Oakland, California are home to some of the country's oldest Asian American communities, as well as to newer immigrants from across Asia. New York City, Chicago, and Washington, D.C. also are home to diverse and longstanding Asian American communities. The greater Boston area, Providence, Philadelphia, Detroit, New Orleans, Minneapolis, St. Paul, and Seattle boast significant communities of Cambodian, Laotian, Vietnamese, and Hmong refugees. Atlanta and the Phoenix metropolitan area are home to newer, rapidly expanding Asian American communities.

The educational experiences of Asian Americans across these geographic areas vary widely. Although there continues to be a common misconception that Asian Americans constitute a homogenous "model minority" group marked by an absence of barriers to educational attainment, in

reality, the Asian American population is remarkably diverse and comprises numerous ethnic groups with distinct educational experiences, histories, and needs. A closer look at the Asian American population reveals significant deficiencies in educational access and equity, often with disparities among different ethnic groups. Further, Asian American English Language Learner ("ELL")[2] students face particular challenges in public education systems that are not faced by their English-proficient peers.

Amici groups dedicate significant time and effort to the educational concerns of Asian American public school students, including the particular needs of ELLs, by advocating for proper assessment and programming in English and other content areas, access to school counseling and other services, interpretation, and translation when appropriate. In addition, several *Amici* organizations represent Asian American and other ELLs in cases of discrimination and other unlawful deprivations.

Based on these experiences, *Amici* groups are well qualified to address a key question before the Court: whether the minimum programmatic requirements in the No Child Left Behind Act of 2001 ("NCLB") guarantee that a state or local educational agency complies with the "appropriate action" requirement of Section 1703(f) of the Equal Educational Opportunities Act of 1974 ("EEOA").

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[2] *Amici* will use the term "English language learners" or "ELLs" to refer to students whose first language is not English and who have not yet attained English proficiency.

Amici submit that the answer to this question is "no." Through their work advocating for Asian American and other ELLs across the country, *Amici* are all too aware that school districts often manage to operate under NCLB-approved plans while falling painfully short of their obligation to provide equal educational access to each and every ELL student.

SUMMARY OF ARGUMENT

The EEOA and NCLB both play important roles in the education of ELL students, but the two statutes serve distinct purposes. Enacted in 2001, NCLB is essentially a funding statute that ties federal grants to assessments of students on a collective basis in a few enumerated subject areas. NCLB provides no private right of action. In contrast, the EEOA is a civil rights statute that is broader in scope and guarantees the rights of each individual ELL to meaningful opportunities in all aspects of education. Of particular importance to ELLs is the EEOA's requirement that educational agencies take "appropriate action" to overcome language barriers that impede an ELL's access to a meaningful education.

NCLB is inherently unreliable as a measure of whether an educational agency is taking appropriate action under the EEOA to ensure equal educational opportunities for individual ELLs. The NCLB does not establish uniform, nationwide standards for school programs, but instead provides a loose framework in which states may develop their own assessments and benchmarks, which are approved by the federal Department of Education. Approved plans vary significantly from one state to another, and NCLB provides numerous ways in which a state

may exclude ELLs from its assessments and reporting. Individual ELLs can, and often do, slip between the cracks of NCLB.

In practice, it is clear that a school's operation under NCLB is no substitute for compliance with the requirements of the EEOA. In school districts that operate under NCLB, discrete ELL populations remain inadequately served. Investigations by the United States Department of Justice have resulted in consent decrees and settlements under the EEOA, even in school districts functioning under NCLB-approved plans. In other cases involving districts that were following NCLB guidelines, ELLs have relied on the EEOA's private right of action to enforce their rights.

ELLs face unique educational challenges, and states, school districts, and individual schools must address those challenges if ELLs are to receive equal educational opportunities. ELLs who speak less common native languages—as many Asian American ELLs do—face additional hurdles. In matters of resource allocation, programming, and assessment, smaller language minority groups often are overlooked, even within ELL populations in a particular school, state, or district. Asian American ELLs' educational needs may not be met even when their schools are operating under NCLB. Consequently, even in those schools operating under NCLB, the EEOA's guarantee of a right to equal educational opportunities for every student remains critical for ELLs, including for Asian American ELLs. For this and other reasons, this Court should affirm the court of appeals' decision.

ARGUMENT

I. Asian American ELLs Face Challenges That Illuminate The Issues in This Case.

Asian American ELLs face numerous educational challenges that result from the linguistic, cultural, and socioeconomic diversity of Asian American communities. Asian American ELLs come from more than 50 ethnic groups and speak more than 100 languages.[3] Nearly half of all Asian Americans between the ages of 5 and 17 speak an Asian or Pacific Islander language.[4] Almost one out of every four Asian American students is an ELL.[5] Although only five percent of the U.S. population, Asian Americans constitute 12 percent of all ELLs nationwide.[6] Asian Americans represent more than 10 percent of ELL populations in more than 28 states. *Id.* In Arizona, Asian Americans and Pacific Islanders make up nearly three percent of all public school and charter school enrollments, totaling

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[3] Stacey J. Lee & Kevin K. Kumashiro, Nat'l Educ. Ass'n, *A Report on the Status of Asian Americans and Pacific Islanders in Education: Beyond the "Model Minority" Stereotype* xi (2005), *available at* www.nea.org/assets/docs/mf_aapireport.pdf.

[4] Asian Am. Legal Def. & Educ. Fund, *Left in the Margins: Asian American Students & the No Child Left Behind Act* 7 (2008) (hereafter, "*Left in the Margins*"), *available at* http://www.aaldef.org/docs/AALDEF_LeftintheMargins_NCLB.pdf.

[5] Randolph Capps, et al., Urban Inst., *The New Demography of America's Schools: Immigration and the No Child Left Behind Act* 27 (Sept. 2005), *available at* http://www.urban.org/UploadedPDF/311230_new_demography.pdf.

[6] *Left in the Margins*, *supra*, at 2.

approximately 32,000 students.[7] According to the 2000 Census, approximately 60 to 70 percent of Arizona's Asian American and Pacific Islander population is foreign born. *Id.* Approximately 9,100 Arizona children between the ages of 5 and 17 speak an Asian language at home. *Id.* at 40. Of those, about 29 percent speak English less than "very well," and 22 percent are classified as "linguistically isolated." *Id.*

Overall, Asian American ethnic groups have some of the highest rates of ELL students. More than half of Hmong Americans between ages 5 and 17 are ELLs.[8] Within the same age group, 39 percent of Vietnamese Americans, 34 percent of Bangladeshi Americans, and 33 percent of Cambodian Americans are ELLs. *Id.* Many of the Asian American ethnic groups with the highest rates of ELLs are Southeast Asian.[9] The additional needs of these communities often are obscured by the stereotype of high-achieving Asian American students.

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[7] APAZI Coal., Ariz. State Univ. Asian Pac. Am. Studies Program & ASU for Ariz., *The State of Asian Americans & Pacific Islanders in Arizona* 39 (2008), *available at* http://apas.clas.asu.edu/pdfs/State_of_AAPI_in_AZ_2008.pdf. The cited study uses the term "Asian American Pacific Islander" students, aggregating Asian American students with those of Pacific Islander origin.

[8] *Left in the Margins, supra*, at 2.

[9] "Southeast Asian American" includes Cambodian, Laotian, Vietnamese, Khmer, and Hmong people. Max Niedzwiecki & T.C. Duong, Se. Asia Res. Action Ctr., *Southeast Asian American Statistical Profile* 9, 15 (2004), *available at* http://www.searac.org/seastatprofilemay04.pdf.

A. Asian American ELLs Face Challenges Common to All ELLs.

Asian American ELLs face many of the same obstacles to achieving academic success that confront other ELLs. For many Asian refugee communities, the trauma of displacement and upheaval of traditional structures make it difficult to navigate the American system, including in education.[10] Additionally, many Asian American ELLs struggle with poverty. For example, more than half of Hmong Americans and 40 percent of Cambodian Americans in California live in poverty.[11] Although only 13.5 percent of Chinese Americans live in poverty nationally, 91.9 percent of Chinese-speaking ELLs attending Boston public schools live in poverty.[12]

Across the country, ELLs have lower high school and college graduation rates, which holds true for Asian American ELLs. Among Cambodian American, Hmong American, and Laotian American

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[10] Julie A. Hopkins et al., *Southeast Asian Refugee Youth: Implications for Juvenile Justice*, 45 Juv. & Fam. Ct. J. 15, 16-17 (1994).

[11] Asian Pac. Am. Legal Ctr. of S. Cal. et al., *The Diverse Face of Asians and Pacific Islanders in California: Asian & Pacific Islander Demographic Profile* 9 (2005), *available at* http://apalc.org/demographics/wp-content/uploads/2006/11/caapalc0905.pdf.

[12] Nicole Agusti et al., Mauricio Gaston Instit. for Latino Comty. Dev. & Pub. Policy, *Identification, Program Participation and Outcomes of English Learners in Boston Public Schools, AY 2003-2006*, manuscript at 19 (on file with authors) (forthcoming April 2009).

communities, 52.7 percent do not finish high school.[13] Although the college graduation rate for Asian Americans overall is 42.4 percent, for Vietnamese Americans it is only 16 percent.[14] For both Cambodian Americans and Laotian Americans, only approximately 5 percent graduate from college. *Id.*

B. Asian American ELLs Also Face Certain Unique Challenges.

The EEOA's requirement that ELLs receive appropriate language services and support is particularly important for Asian American ELLs, who collectively speak more than 100 different languages.[15] In California, eight out of the ten most common native languages for ELLs are Asian languages.[16] In New York City, the nation's largest public school system, school materials are published in eight languages, five of which are Asian languages. *Id.* at 4.

Many Asian American ELLs come from linguistically isolated households,[17] making

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[13] C.N. Le, *Socioeconomic Statistics & Demographics*, Asian-Nation: The Landscape of Asian America (Mar. 15, 2009), http://www.asian-nation.org/demographics.shtml.

[14] Theresa Nguyen, *Asian Americans Must Enter Admissions Debate*, Yale Herald, Feb. 13, 2003, *available at* http://www.yaleherald.com/article-p.php?Article=1756.

[15] Lee, *supra*, at xi.

[16] *Left in the Margins*, *supra*, at 5.

[17] A linguistically isolated household is one "in which no one 14 years old or over speaks only English and no one who speaks a language other than English speaks English 'very well.'" U.S. Census Bureau, *We the Americans: Asians* 5 (1993).

navigation of the public education system an arduous task for them. Based on the 2000 Census, only 4.1 percent of all U.S. households are linguistically isolated.[18] In comparison, 46 percent of Vietnamese American households, 41 percent of Korean American households, and 35.3 percent of Chinese American households are linguistically isolated.[19] Furthermore, many Asian American ELLs come from families with little or no education. For many Asian American families, ELL students are the first to attend high school, or even to have any formal education.[20] Three out of five Southeast Asian American parents, for example, have less than three years of formal education. *Id.* Likewise, 45 percent of Hmong Americans and 26.2 percent of Cambodian Americans over the age of 25 have no formal schooling.[21] As such, linguistic isolation and lack of education frequently constitute formidable barriers to meaningful parental involvement in the education of many Asian American ELLs.

English as a Second Language ("ESL") and bilingual teacher shortages are pervasive, especially

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[18] *Left in the Margins, supra*, at 10; *see* Hyon B. Shin & Rosalind Bruno, *Census Brief: Language Use and English-Speaking Ability: 2000* 10 (2003), *available at* http://www.census.gov/prod/2003pubs/c2kbr-29.pdf.

[19] *Left in the Margins* at 10-11.

[20] Khatharya Um, Se. Asia Res. Action Ctr., *A Dream Denied: Educational Experiences of Southeast Asian Youth* 6 (2003), *available at* http://www.searac.org/ydfinal-2_03.pdf.

[21] Niedzwiecki, *supra*, at 15.

among teachers who speak Asian languages.[22] Although ELLs are the fastest growing groups in K-12 education, only 2.5 percent of teachers nationwide have received appropriate training for the instruction of ELLs.[23] It is striking that there are even fewer qualified teachers who speak Asian languages. In California, for example, there is only one Hmong-speaking teacher for every 1,113 Hmong-speaking ELL students and only one Khmer-speaking teacher for every 21,000 Khmer-speaking ELL students.[24]

Asian American ELLs lack targeted education programs throughout the country. For instance, although Asian American ELLs make up over 12 percent of the ELL population in New York City, as of 2008 only five of the 70 dual language schools in the city focused on an Asian language.[25]

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[22] *Left in the Margins, supra*, at 9. *Amici* note that the EEOA does not require bilingual education, but rather requires "appropriate language support" in whatever form that may take.

[23] Danling Fu & J. Graff, *The Literacies of New Immigrant Youth*, in Handbook of Adolescent Literacy Research 18 (Leila Christenbury et al. eds., 2008).

[24] Um, *supra*, at 9.

[25] New York City Dep't of Educ., Office of English Language Learners, *Spring 2009 Education Policy Panel Presentation* (2009), *available at* http://groups.google.com/group/manhattanpep?lnk= (follow "ELL Update 200902.pdf" hyperlink); New York City Dep't of Educ., Office of English Language Learners, *New York City's English Language Learners: Demographics* 7 (Summer 2008), *available at* http://print.nycenet.edu/NR/rdonlyres/3A4AEC4C-14BD-49C4-B2E6-8EDF5D873BE4/42968/2008_DemoReportFINAL.pdf.

II. Operation Under NCLB's Limited Requirements Does Not Ensure Appropriate Action under the EEOA.

Petitioners' argument in this case rests on two flawed assumptions: (1) that the EEOA and NCLB have the same purpose with respect to ELLs and (2) that NCLB provides specific standards for the implementation of adequate ELL programs, making the EEOA superfluous.

Although the EEOA and NCLB share certain general principles, they do not serve the same purpose with respect to ELLs. The EEOA requires educational agencies to take appropriate action to overcome language barriers that impede equal participation by students in instructional programs. To that end, the EEOA provides every individual student with the ability to redress a violation of their rights through a private right of action. That is not true of NCLB, which was enacted pursuant to the Congressional spending power and, at its core, is a funding statute that ties particular state academic achievement benchmarks for all students (including ELLs) to federal grant money.

While NCLB sets forth certain benchmarks for the standards and assessment systems of educational programs in states that receive NCLB funding, satisfaction of those requirements, in many circumstances, is not sufficient to constitute the "appropriate action" states must take under the EEOA to overcome barriers to ELLs' equal participation in education.

A. NCLB Requirements for Standards and Assessment Systems Have a Limited Focus and Do Not Address All Aspects of Education to Which the EEOA Broadly Applies.

The EEOA broadly aims to ensure that no individual student is deprived of an equal educational opportunity because of "the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." 20 U.S.C. § 1703(f). The EEOA protects equal participation for ELLs in all instructional programs, regardless of the subject area or aspect of the educational program to which the language barrier pertains. *See* 20 U.S.C. § 1703(f); *see also Gomez v. Ill. State Bd. of Educ.*, 811 F.2d 1030, 1042-43 (7th Cir. 1987) (considering state guidelines and "what actually occurs in the classroom"). The EEOA thus applies to the full spectrum of educational programming available in a school.

In contrast, NCLB focuses on a limited range of specified subject areas in which student performance is measured, on a collective rather than individual basis. 20 U.S.C. § 6311(b)(2). Any state that desires to receive funding under NCLB must submit a plan to the DOE for approval. 20 U.S.C. § 6311(a)(1). Specifically, under NCLB, state and local education agencies must set standards for, test on, and report aggregated student scores for mathematics, reading/language arts, and science. *See* 20 U.S.C. § 6311(b)(1)(C); 20 U.S.C. § 6311(b)(3). Of those three subjects, states are accountable only for setting and meeting measurable performance

objectives in mathematics and reading/language arts. 20 U.S.C. § 6311(b)(2)(G)(i). If a state fails to meet the requirements set forth in Section 6311, the Secretary of Education may—but is not required to —withhold federal funds from the state. 20 U.S.C. § 6311(g)(2).

Because of their limited scope, NCLB's provisions cannot, and do not, address all aspects of education to which the EEOA applies. A state educational agency can satisfy NCLB standards as to mathematics and reading/language arts without meeting the broader "equal participation" requirement under the EEOA.

Further, although Title III (20 U.S.C. § 6841(a)(3)) of NCLB requires that ELLs take an annual English language proficiency exam, NCLB does not consider any individual test scores for accountability purposes, but instead assesses the Adequate Yearly Progress ("AYP") of students on a collective basis at the school, district, and state levels, with separate group measurements for students based on poverty, race and ethnicity, disability, and ELL status. 20 U.S.C. § 6841(b)(2)(C)(v). By holding states accountable only for *collective* AYP, NCLB by definition does not ensure that every *individual* ELL makes adequate yearly progress.

B. NCLB Does Not Provide a Reliable Benchmark for Measuring Whether Each Individual ELL Student is Receiving an Equal Educational Opportunity.

Several of NCLB's features make it possible for certain ELLs—often Asian American and other ELLs who speak less common languages—to slip through the cracks, even in schools and districts that operate pursuant to state plans approved under NCLB. As such, NCLB does not provide a reliable benchmark for measuring whether each ELL student in a given school or district is receiving equal educational opportunities under the EEOA.

1. NCLB Alone Fails to Ensure That Schools Meet Specific Needs of Discrete Populations of ELLs.

Although state educational programs implemented under NCLB may result in the provision of certain educational services for some ELLs, they still may fail to meet the specific needs of other discrete ELL populations. The lack of programs targeted at the needs of smaller language groups, such as Asian American ELLs, demonstrates the continued need for the EEOA as a mechanism to ensure equal educational opportunities for *all* ELLs. This problem is illustrated by the case of two Cambodian sisters who spoke no English, yet were placed in a mainstream English-only 5th grade classroom in San Antonio, Texas.[26] After six months,

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[26] Wayne E. Wright & Xiaoshi Li, *Catching Up in Math: The Case of Newly-Arrived Cambodian Students in a Texas* (...continued)

despite having excelled academically in Cambodia, both girls performed poorly on the Texas math assessment. *Id.* at 17. The test was too linguistically complex and immersion in an English-only classroom had failed to provide them with the necessary English skills to take the test. *Id.*

A lack of native language assessments is another reason that the needs of Asian American ELLs are often inadequately addressed in programs implemented under NCLB. Many Asian American ELLs perform poorly on academic assessments simply because those assessments are too difficult for them linguistically.[27] Even in schools that develop model instructional programs—such as Wellstone International High School in Minneapolis, which serves 160 students who speak Somali, Amharic, Oromo, French, Tibetan, Vietnamese, Cambodian, Hmong, Spanish, and Russian—ELLs' success may be hampered by a lack of testing accommodations.[28] Minnesota offers no native language testing accommodations for ELLs, so the majority of Wellstone's students continue to struggle to pass Minnesota's Basic Skills Test, which they must pass to graduate. *Id.*

Intermediate School, 9 TABE J. 1, 3 (Spring/Summer 2006), *available at* http://www.tabe.org/members/Catching%20_up_in_Math.pdf.

[27] *See id.* at 17; *Left in the Margins*, *supra*, at 4.

[28] *See* Ruth Schultz & Craig Vana, *Coming to America: Minneapolis's Newcomer Program*, 65 Sch. Admin. 18 (2008), *available at* 2008 WLNR 22072615.

A recently proposed reauthorization draft of NCLB included a provision that would have required each state to develop and use native language assessments if 10 percent or more of ELLs throughout the state spoke the same native language.[29] However, such a *statewide* trigger would continue to exclude many Asian American ELL populations, including those who live in high concentrations in districts throughout the country but who make up a smaller proportion within their given states. *Id.* at 4-5. For example, in San Francisco County, 35.2 percent of ELLs speak Cantonese.[30] By contrast, at the state level in California, only 1.4 percent of ELLs speak Cantonese, well below the proposed 10 percent trigger. *Id.* In Seattle, 15.5 percent of ELLs speak Vietnamese; however, Vietnamese ELLs only account for 3.8 percent of ELLs statewide in Washington state.[31] Likewise, in Lowell,

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[29] *Left in the Margins, supra,* at 4.

[30] Educ. Demographics Unit, Cal. Dep't of Educ., *Number of English Language Learners by Language, 2006-07, San Francisco* (Mar. 15, 2009), *available at* http://dq.cde.ca.gov/dataquest/LEPbyLang2.asp?cChoice=LepbyLang2&cYear=200607&TheCounty=38%2CSAN+FRANCISCO&cTopic=LC&cLevel=County.

[31] *Left in the Margins, supra,* at 5; *see* Seattle Pub. Sch., *Data Profile District Summary* (Dec. 2006), *available at* http://www.seattleschools.org/area/siso/disprof/2006/DP06demog.pdf; Pete Bylsma et al., Wash. Office of Superintendent of Pub. Instruction, *Educating English Language Learners in Washington State: Annual Report of the State Transitional Bilingual Instruction Program, School Year 2001-2002* 23 (Dec. 2003), *available at* http://www.k12.wa.us/research/pubdocs/BilingualreportDec2003.doc.

Massachusetts, 40 percent of ELLs are native Khmer (Cambodian) speakers, while only 4.1 percent of ELLs are native Khmer speakers in Massachusetts.[32]

2. NCLB "Standards" Fail to Establish a Consistent, Universal Measure of the Appropriateness of State Education Plans Because States Set Their Own Benchmarks.

The academic assessment and accountability provisions of NCLB fail to establish a consistent, uniform measure of the adequacy or appropriateness of state ELL education plans. Each state is permitted to design its own standards, assessments, and benchmarks, which are submitted to the DOE in a "Consolidated State Application and Accountability Workbook" for approval.[33] States also have considerable flexibility in defining subgroups and providing testing accommodations, which can cause large state-to-state disparities. As a consequence of the lack of true NCLB "standards," ELLs in different states experience wide variation in the quality of their education. *Amici* offer the following illustrations:

First, Title I of NCLB sets the base level of proficiency at the higher of (1) the proficiency rate for the lowest achieving student subgroup in the

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[32] Mass. Dep't of Educ., *District and School Languages* (Mar. 2006), *available at* http://www.doe.mass.edu/ell/statistics/lep.html; *Left in the Margins*, *supra*, at 5.

[33] *See* U.S. Dep't of Educ., *Approved State Accountability Plans*, http://www.ed.gov/admins/lead/account/stateplans03/index.html (last visited Mar. 24, 2009).

state or (2) the proficiency rate of the school at the 20th percentile of overall performance statewide. 20 U.S.C. § 6311(b)(2)(E). In practice, the proficiency rate of the school at the 20th percentile of overall performance statewide is always a higher number, meaning that subgroups like ELLs start out below base-level proficiency.[34]

States must set intermediate proficiency benchmarks in equal increments, but are allowed to increase their improvement goals every three years rather than yearly. 20 U.S.C. § 6311(b)(2)(H). In practice, this has led many states to set intentionally modest initial goals over three-year stretches, with huge yearly jumps in improvement shortly before 2014. Back-loading large gains in AYP for later years masks the lack of progress by some groups during the earlier years.

A second example of NCLB's failure to set clear standards is its failure to specify the minimum number of students that must constitute a subgroup (known as the "n-size") for score-reporting or AYP. The lack of a standard n-size allows states to exclude smaller groups of ELLs and other vulnerable groups from assessment and, thereby, effectively ignore their educational progress. To count toward AYP, a group must be large enough to yield "statistically

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[34] *See* Christine Rossell, *Making Uneven Strides: State Standards for Achieving English Language Proficiency Under the No Child Left Behind Act* 3 (2005); Thomas J. Kane & Douglass O. Staiger, *Unintended Consequences of Racial Subgroup Rules*, in *No Child Left Behind? The Politics and Practice of School Accountability* 152, 161 (Paul E. Peterson & Martin R. West eds., 2003).

reliable information" and not so small that it might reveal "personally identifiable information." 34 C.F.R. § 200.7(a)-(b). Each state is allowed to set out its own minimum n-size in its DOE-approved plan. The average n-size is 40, but the range is extremely broad and the definitions vary by state in complexity.[35] For example, Maryland uses a flat minimum of 5 students and New York uses 30 students, while Texas uses a school and/or district minimum of 50 students in a subgroup so long as they represent at least 10 percent of all students, or 200 students even if that group is less than 10 percent of all students.[36] It is possible, then, for a school in Texas to have 199 ELLs but still not have them count for school AYP if there are more than 2000 students in the school.

A lower n-size makes a school more likely to be held accountable for the performance of its subgroups. Superintendent Horne's 2008 complaint against the U.S. Department of Education illustrates why states have incentives to set a high n-size: "First, Arizona has large numbers of LEP students. In states where the number of LEP students is small, LEP student proficiency has little or no consequence

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[35] Comm'n on No Child Left Behind, *The Commission's Recommendations in Practice: What the New N-size Policy Would Mean in California* (2007), *available at* http://staging.aspeninstitute.org/sites/default/files/content/docs/commission%20on%20no%20child%20left%20behind/NSizeBriefEditedFINAL25.8.071.pdf.

[36] *See Approved State Accountability Plans, supra*, § 5.5, *available at* http://www.ed.gov/admins/lead/account/stateplans03/index.html.

upon the ability of schools to make AYP...." *Horne v. United States Dep't of Educ.*, 2: 08-cv-01141, Complaint for Declaratory Judgment ¶ 16 (D. Ariz. June 19, 2008). Asian American ELLs in states with a higher n-size are likely to be overlooked, especially when a state's Asian population is small or geographically dispersed.

Further exacerbating the danger that vulnerable subgroups will be overlooked is NCLB's "safe harbor" exception for subgroups, under which schools will still meet AYP if (i) the percentage of students in the subgroup that did not meet proficiency decreased by at least 10 percent compared to the previous year and (ii) the subgroup made progress in a discretionary area of measurement such as grade-to-grade retention or attendance. 20 U.S.C. § 6311(b)(2)(I). A school whose goal is to have 60 percent of its ELLs proficient in reading/language arts could meet AYP even if it had only 30 percent of its ELLs attain proficiency in reading/language arts, provided that only 20 percent had been proficient the year before and the ELLs had made progress in their attendance rates. In the Nogales Unified School District in 2008, for example, fourth-, sixth-, and eighth-grade ELLs met the reading AYP only through use of this safe harbor.[37]

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[37] *See* Ariz. Dep't of Educ., *School Report Cards*, http://www10.ade.az.gov/ReportCard/DistrictDetails.aspx?id=4457&ReportLevel=2 (available under "AYP" tab) (last visited Mar. 24, 2009).

Finally, under NCLB, states have discretion in specifying the academic content standards for state assessments that are tied to federal funding. "Since there is no central control of standards, states can get free money simply by making tests easier to pass."[38] A DOE report on testing standards under NCLB found that "[s]tates varied widely in the levels at which they set academic achievement standards to define student proficiency."[39] The report explained that states with higher standards tended to have a lower percentage of "proficient" students. *Id.* A similar study by the Fordham Institute compared state proficiency standards. That study found that Arizona had the second least restrictive AYP passage rates among the 28 states measured, which was partly attributable to relatively low proficiency standards in the early grades, particularly in reading, and to the fact that Arizona measures minimum n-size for subgroups by grade level rather than by school.[40] For instance, with Arizona's n-size set at 40 per grade level, a middle school could have 60 ELLs spread evenly between two grades and still not have any of those ELLs' scores count toward AYP.

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[38] *The Teacher-in-Chief Speaks*, Economist, Mar. 14, 2009, at 31, *available at* http://www.economist.com/world/unitedstates/displaystory.cfm?story_id=13279059.

[39] Kerstin Carlson Le Floch et al., U.S. Dep't of Educ. Policy & Program Studies Serv., *State and Local Implementation of the No Child Left Behind Act, Vol. III, Accountability Under NCLB: Interim Report* 1 (2005).

[40] Thomas B. Fordham Inst., *The Accountability Illusion* (Feb. 19, 2009), *at* http://www.edexcellence.net/index.cfm/news_the-accountability-illusion.

In sum, NCLB does not provide "extensive" or "detailed" standards for improving the education of ELL students, as Petitioners argue. Rather, NCLB provides only a loose framework. The result is a lack of uniformity among states that allows some ELL students to be left behind. In addition to the various mechanisms by which ELL students may be excluded from assessment, ELL students are tested under widely varying conditions, usually in English—a language in which they are, by definition, not proficient. A student who meets the proficiency level in one state might not meet it in another state, because one state's "proficient" is another's "deficient." This system falls well short of ensuring that every ELL student receives equal educational opportunities, as the EEOA requires.

3. NCLB Assessments May Underestimate Educational Progress by ELLs in Some Cases and Overestimate It in Others.

For several reasons, whether a school is making AYP under NCLB is not an accurate measure of the academic content that ELLs are learning.

First, optional regulatory exemptions under NCLB provide ways for a state to exclude ELLs' test scores so that they do not adversely affect a school's AYP, which in turn masks deficiencies in ELLs' learning of academic content. *See* 34 C.F.R. § 200.6(b)(2)-(4).

Second, ELLs' scores on NCLB assessments are inconsistent indicators of their actual educational progress because the DOE allows schools

to group former ELLs' scores with current ELLs' scores for up to two years after the former ELLs have been reclassified as English proficient. 34 C.F.R. § 200.20(f)(1). This practice may diminish the contrast between ELL and non-ELL performance within ethnic subgroups, which in turn may have an especially important impact on Asian American ELLs, who are members of a number of distinct ethnic groups.

Finally, ELLs, by definition, are not yet proficient in English, but, under NCLB, many ELLs must take their core subject tests in English after only one year in an American school system. *See* 34 C.F.R. § 200.6(b)(4).

C. EEOA Violations Have Occurred in Schools Are Operating Under NCLB.

While all 50 states have NCLB plans approved by the DOE,[41] school districts in various states nevertheless have been found or alleged to violate the EEOA, as acknowledged in consent decrees obtained by the Department of Justice and as documented in other cases described below. These examples refute Petitioners' argument that the NCLB sets a "benchmark" for compliance with the "appropriate action" requirement of the EEOA.

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[41] *See* Press Release, U.S. Dep't of Educ., *President Bush, Secretary Paige Celebrate Approval of Every State Accountability Plan under No Child Left Behind* (June 10, 2003), *available at* http://www.ed.gov/news/pressreleases/2003/06/06102003.html.

1. EEOA Investigations by the DOJ Have Resulted in Consent Decrees Against and Settlements Involving Schools Operating Under NCLB.

The federal government's pursuit of EEOA complaints in school districts operating under NCLB demonstrates that the DOE's approval of a state's programmatic requirements is not enough to ensure compliance with the EEOA. The Civil Rights Division of the United States Department of Justice ("DOJ") oversees enforcement of civil rights laws on behalf of the federal government, which includes enforcing "federal statutes which prohibit discrimination in public elementary and secondary schools," including the EEOA.[42] In several cases, the DOJ's efforts have resulted in court-monitored consent decrees or out-of-court settlements that mandate a school district's compliance with the EEOA as to educational programs for ELLs.[43]

In *United States v. City of New York*, No. CV-04-248 (E.D.N.Y. June 29, 2004), the DOJ brought a lawsuit under the EEOA against the New York City Department of Education for violating the rights of predominantly Asian American ELLs at Lafayette High School in Brooklyn, New York. Lafayette High

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[42] U.S. Dep't of Justice, Civil Rights Div., *Civil Rights Activities and Programs* (2006 ed.), *available at* http://www.usdoj.gov/crt/activity.php.

[43] U.S. Dep't of Justice, Civil Rights Div., *Educational Opportunities Section Case Summaries*, http://www.usdoj.gov/crt/edo/documents/casesummary.php (last visited Mar. 24, 2009).

School is located in Bensonhurst, a historically Italian enclave that recently experienced a large increase in its immigrant Asian population.[44] The DOJ alleged, based on a two-year investigation of Lafayette High School, that the New York City Department of Education "denied ELL students at [the school] equal educational opportunities by failing to take appropriate action to overcome language barriers that impeded these students' equal participation in the school's instructional programs[.]" *City of New York*, Consent Decree at 2 (filed June 1, 2004). Specifically, the DOJ found that "the ELL program at [Lafayette] suffer[ed] from deficiencies [in] assessment, class placement, academic counseling, monitoring of exited students, and communication with ELL parents and students[.]" *Id.* The DOJ and the New York City Department of Education entered into a three-year consent decree mandating, among other things, procedures and a timeline for English assessment and placement, programmatic and curricular equality for ELLs, access to counseling and other services for ELLs, certified and qualified teachers for ELLs, and appropriate interpretation and translation services for ELLs' parents. *Id.* at 10-18.

After an investigation concerning the treatment of Bound Brook, New Jersey's predominantly Spanish-speaking ELLs, the DOJ pursued a 2003 settlement under the EEOA with the

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[44] Fernanda Santos, *For Italians in Brooklyn, Voices On The Streets Have Changed*, N.Y. Times, Jan. 6, 2009, *available at* http://www.nytimes.com/2009/01/07/nyregion/07italians.html.

local school district. Similarly, after an investigation concerning equal educational access in Lewiston, home to Maine's growing Somali refugee population, the DOJ entered into a 2007 settlement agreement under the EEOA with the local school district. Both agreements mandate, among other things, procedures to identify and place ELLs; an interpretation and translation policy; curricular alignment between ELL instruction and state content instructional standards; ELL instructional training for both English as a Second Language and content area teachers; equitable teacher student ratios for ELLs; and equal access for ELLs to all extracurricular activities, resources, and school programming.[45]

2. There Also Are Documented Problems in Cases Outside of the DOJ Enforcement Context.

Outside the DOJ enforcement context, there are additional instances in which school districts operating under NCLB have suffered from documented problems in providing all ELLs with access to equal educational opportunities through NCLB plans. These examples demonstrate that merely implementing an education program under NCLB does not guarantee compliance with the EEOA's requirement that a school "follow through

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[45] *See* Settlement Agreement between the United States & Bound Brook, N.J. Bd. of Educ. 3-9, *available at* http://www.usdoj.gov/crt/edo/documents/bbrookag.pdf; Settlement Agreement between the United States & Lewiston, Me. Sch. Dep't 3-5, *available at* http://www.usdoj.gov/crt/edo/documents/LewistonAgree..pdf.

with practices, resources, and personnel" necessary to "implement effectively the educational theory adopted by the school," and achieve a "parity of participation with other students" for ELLs. *Castañeda v. Pickard*, 648 F.2d 989, 1008-10 (5th Cir. 1981).

Recent changes implemented by the New York City Department of Education ("NYCDOE") highlight the tension between meeting accountability requirements and providing an equal education. In 2002, the NYCDOE began an initiative to replace large, failing high schools with new, smaller high schools.[46] These small schools represent a potential opportunity for New York City's ELLs—who make up 14 percent of the overall public school student population and speak 152 languages—but only if the small schools serve ELLs effectively.[47] ELLs

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[46] The NYCDOE defines a small school as having approximately 500 students or less. New York City Dep't of Educ., *High School Enrollment Choices*, http://schools.nyc.gov/ChoicesEnrollment/High/Choices/default.htm (last visited Mar. 24, 2009); *see* Advocates for Children et al., *So Many Schools, So Few Options: How Mayor Bloomberg's Small High School Reforms Deny Full Access to English Language Learners* 5 (Nov. 2006) (hereafter, "*2006 Report*"), *available at* http://www.advocatesforchildren.org/pubs/2005/ellsmallschools06.pdf.

[47] More than 12 percent of the New York City ELL population is Asian American. New York City Dep't of Educ., Office of English Language Learners, *Spring 2009 Education Policy Panel Presentation* (2009), *available at* http://groups.google.com/group/manhattanpep?lnk= (follow "ELL Update 200902.pdf" hyperlink).

enrolled in high school account for more than 12 percent of the total ELL student population.[48]

In schools where ELLs are served, early signs indicate that New York City's small high school program may benefit ELL students.[49] Yet, most small high schools do not serve ELLs, and the majority of ELLs in small schools are concentrated in a few that are dedicated specifically to serving their needs.[50] Local advocates, including New York State United Teachers Vice-President Maria Neira, have called on the State Educational Commissioner to "take immediate and deliberate action" in response to the "systematic crisis" for ELLs in New York City, specifically identifying the problem of lack of access by ELLs to new small high schools over the last three to four years.[51] ELL students are being denied

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[48] New York City Dep't of Educ., Office of English Language Learners, *Designing Better High Schools for ELLs: Research Summary* 1 (Spring 2008), *available at* http://schools.nyc.gov/NR/rdonlyres/E5BF4C47-6C62-4D67-8449-6AC894F3E0A4/39554/HSResearchSummary_2008_FINALReadOnly.pdf.

[49] For example, approximately 85 percent of ninth grade ELLs in small schools were promoted to tenth grade, as compared with a 20 percent lower rate for ELLs in all other schools. *2006 Report*, *supra*, at 6. Seventy-five percent of ELLs in small schools earn at least ten credits in ninth grade – a key predictor of on-time graduation – compared to 56 percent of ELLs in other high schools citywide. New York City Dep't of Educ., News & Speeches, *Mayor, Chancellor Announce the Opening of 42 New Schools in September* (Mar. 1, 2009), *available at* http://schools.nyc.gov/Offices/mediarelations/NewsandSpeeches/2008-2009/20090301_new_schools.htm.

[50] *2006 Report*, *supra*, at 29.

[51] Coal. for Educ. Excellence for English Language Learners, Open Letter to N.Y. Educ. Comm'r Richard Mills, *Responding to* (...continued)

full access to small high school options offered by the New York City public school system.[52] Even when ELL students are able to gain access to small high schools, many of those schools do not provide the mandated ELL programming. *Id.* at 7-8.

NCLB provides no solution for the access issues that ELL students face with respect to the NYCDOE high school reforms. Nor does NCLB expose deficiencies in the ELL programming itself. There may be no ELL students in a school, or too few ELLs (New York uses an n-size of 30) to make a difference in the yearly testing results that monitor school and district compliance under NCLB.[53] For example, based on its 2006-07 performance, Pelham Preparatory Academy in the Bronx was found to be "In Good Standing" under NCLB.[54] Yet, according to its official course schedule, the school offered no English-fluency classes during the 2006-07 academic year for its 11 eligible ELL students.[55] ELL students in New York City high schools have been faced with

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the Systematic Crisis for English Language Learners (ELLs) in New York City, Aug. 18, 2008, *available at* http://www.nysut.org/cps/rde/xchg/nysut/hs.xsl/k12_10761.htm.

[52] *See 2006 Report*, *supra*, at 29.

[53] *See Approved State Accountability Plans*, *supra*, § 5.5, *available at* http://www.ed.gov/admins/lead/account/stateplans03/index.html.

[54] New York City Dep't of Educ., *Progress Report 2007-08 for Pelham Preparatory Academy*, http://schools.nyc.gov/OA/SchoolReports/2007-08/ProgressReport_HS_X542.pdf (last visited Mar. 24, 2009).

[55] Samuel G. Freedman, *English Language Learners as Pawns in the School System's Overhaul*, N.Y. Times, May 9, 2007.

the unenviable decision of choosing between enrollment in a small school with no ELL program or enrollment in a larger school with ELL programs, but which otherwise provides an inadequate education.[56]

Seattle, Washington, whose residents include large populations of recently immigrated Vietnamese, Cambodian, Lao, Hmong, and Mien refugees, as well as long-standing Japanese, Chinese, and Filipino populations dating back to the 1800s, provides another example of schools meeting accountability requirements under NCLB while not meeting the educational needs of individual ELL students.[57] Nearly one in four of the approximately 45,000 students enrolled in Seattle Public Schools is an ELL. *Id.* at 8. Asian American students constitute approximately 40 percent of all Seattle ELLs. *Id.* Although Spanish is the most commonly spoken native language among Seattle's ELLs, the most commonly spoken languages for Seattle's Asian American ELLs are Vietnamese, Cantonese, and Tagalog. *Id.*

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[56] *See* Meredith Kolodner, *English-Only Rise in New York City High School Graduation Rates*, Daily News, Feb. 22, 2009 (noting that ELL students comprised more than a quarter of the student body at two large high schools recently closed).

[57] Council of the Great City Sch., *Raising the Achievement of English Language Learners in the Seattle Public Schools: Report of the Strategic Support Team of the Council of Great City Schools* 88, 94 (2008), *available at* http://www.seattleschools.org/area/strategicplan/CGCS_Bilingual_Review_Report.pdf.

Despite Seattle's implementation of an education plan approved by the DOE under NCLB, a 2008 study found Seattle's ELL program to be "highly fragmented, weakly defined, poorly monitored, and producing very unsatisfactory academic results."[58] *Id.* The report concluded that "[n]o overarching theory of action appears to be guiding the instruction of [ELLs], and that "[t]he school system does not have a clear set of goals for addressing the needs of [ELLs]." *Id.* at 5-6, 22, 24-25. Among the problems are a lack of sufficient professional development in ELL teaching methodology for teachers of English and other subjects and undue reliance on instructional assistants. *Id.* at 6, 26-27, 41-44. Further, Seattle's student registration and placement process chronically under-identifies ELLs and inadequately monitors ELLs' academic progress. *Id.* at 6. Many of these deficiencies identified by the study were similar to those found by the DOJ in its EEOA investigations, which resulted in consent decrees or settlement agreements, as described in Section IV.C.2.

Similar problems have been reported in school districts across the country. Notably, many districts and states suffer from a lack of certified teachers for ESL classes as well as a dearth of teacher training in ELL methodologies. For example, the state of Minnesota has just one certified ELL instructor for every 49 students, compared with a national average

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[58] *See* Seattle Pub. Sch., *No Child Left Behind*, http://www.seattleschools.org/area/main/Nochildleftbehind.xml (last visited Mar. 20, 2009).

of one teacher for every 19 students.[59] Other districts have experienced difficulty finding ESL teachers to serve rapidly expanding ELL populations. In 2004, for instance, a majority of Charlotte-Mecklenberg Schools' 17 open teaching positions were for ESL teachers.[60] Similarly, teachers certified in ESL represent a "critical shortage area" in New York City.[61]

In Chicago, Illinois, Eun Young Lee, a staff member at the Korean American Resource and Cultural Center, reports that some students are not adequately assessed before being placed into ELL programs, and that testing to advance out of ELL programs is inconsistent.[62] Other local advocates concur that ELL assessment—both at initial student enrollment and in subsequent years—is inconsistent across different schools.[63]

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[59] Megan Boldt, *Report: Minnesota Schools Preparing Students for Success – Mostly. But English Learning Services Faulted*, St. Paul Pioneer Press, Jan. 6, 2009.

[60] Tiffani Helgberg, *Demand For ESL Grows at CMS*, WCNC Local News for N.C., Aug. 17, 2004, http://www.wcnc.com/news/local/stories/wcnc-081704-ds-limitedengishstudents.881cde02.html.

[61] New York City Dep't of Educ., *Subject Areas, available at* http://schools.nyc.gov/TeachNYC/WhoWeLookFor/SubjectAreas/subjectareas.htm.

[62] Telephone interview by Brian Redondo with Eun Young Lee, Citizenship and Youth Coordinator, Korean Am. Res. & Cultural Ctr. (Mar. 3, 2009).

[63] Telephone interview by Brian Redondo with Alvin Yu, Dir. of Multi-Cultural Youth Project, Chinese Mut. Aid Ass'n (Mar. 4, 2009).

ELLs and their parents often also face challenges accessing interpretation and translation services, even where schools or districts are operating under NCLB requirements. A lack of properly trained staff and inadequate procedures make these challenges particularly acute for smaller language groups, such as Asian Americans. The School District of Philadelphia's parent handbook, for example, is the only document that the district consistently translates into Khmer (Cambodian).[64] Translation of a document into Khmer often takes upwards of four to six weeks, far longer than translations into more common languages such as Spanish. *Id.*

A lack of appropriate staff, services, or instructional support to serve ELLs also can effectively prevent ELLs from participating in school programs, even where schools are operating under NCLB. As described above, ELLs in New York City face difficulty accessing appropriate services at many smaller schools. Similarly, ELLs in Minneapolis, Minnesota cannot participate in a successful voluntary integration program—one in which participating students of color outperform nonparticipating students of color on statewide tests.[65] According to the Minneapolis Public School's

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[64] Interview by Khin Mai Aung with Rorng Sorn, Executive Dir., Cambodian Ass'n of Greater Philadelphia, in Philadelphia, Pa. (Mar. 12, 2009).

[65] Patrice Relerford, *Standing Room Only Crowd Tells Mpls. School Officials: Keep Voluntary Integration Program*, Star Tribune, Mar. 6, 2009, *available at* http://www.startribune.com/local/south/40828062.html.

Director of Student Placement Services, "The reason we don't place [ELLs in schools participating in the voluntary integration program] is they don't have the staff or programs in place to support ELL students." *Id.* Similarly, ELLs in Sacramento, California have difficulty accessing school-run preparation courses for the state high school exit examination. According to Pa Kou Vang of the Hmong Women's Heritage Association, Hmong American ELLs are not adequately informed about these courses and cannot fully participate because they are taught in English.[66]

D. The EEOA Protects the Rights of Individual ELL Students in Ways that NCLB Does Not.

Differences in the enforcement mechanisms available under the EEOA and NCLB are emblematic of the statutes' distinct purposes—protection of individual rights under the EEOA, and targeted, funding-related educational reform under NCLB. As Respondents Flores and Rzeslawski note in their brief, the EEOA expressly provides individual students with the ability to redress violations of their rights through a private right of action in a federal district court. Respondents' Brief at 53. In contrast, NCLB does not. 20 U.S.C. § 6311(g)(2); *see Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002) ("'In legislation enacted pursuant to the spending power, the typical remedy for state

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[66] Telephone interview by Brian Redondo with Pa Kou Vang, Program Manager, Hmong Women's Heritage Ass'n (Mar. 16, 2009).

noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State.'") (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981)).

Enforcement mechanisms are critical for ELLs, who historically have relied on federal court enforcement of the EEOA to ensure that schools and educational institutions are taking "appropriate action" to meet their unique educational needs—including where the school or district in question was operating under NCLB guidelines.[67] At the same time, courts consistently have denied individual efforts to enforce rights under NCLB because "the overall structure of the [NCLB] supports the

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[67] *See, e.g.*, *Gomez v. Ill. State Bd. of Educ.*, 811 F.2d 1030, 1044 (7th Cir. 1987) (reversing dismissal of Spanish-speaking ELL students' EEOA claims); *United States v. Texas*, 572 F. Supp. 2d 726, 766 (2008) (finding that indicators used to monitor state's ELL program "may be effective in facilitating compliance with the incremental improvements required for all students for NCLB, but the indicators are inadequate as a basis for intervention to ensure the current rights of individual students as required by the EEOA." (citation omitted); *Leslie v. Bd. of Educ. for Ill. Sch. Dist. U-46*, 379 F. Supp. 2d 952, 956, 961 (N.D. Ill. 2005) (denying motion to dismiss EEOA claims by ELL students against school district operating under NCLB regulations); *Heavy Runner v. Bremner*, 522 F. Supp. 162, 165 (D. Mont. 1981) (denying summary judgment on EEOA claims by Blackfoot-speaking ELL students); *Rios v. Read*, 480 F. Supp. 14, 23-24 (E.D.N.Y. 1978) (holding that school district's bilingual education program violated Puerto Rican and Hispanic ELL students' rights under the EEOA, following a bench trial).

conclusion that Congress did not intend to confer enforceable individual rights...."[68]

For Asian American ELLs, the opportunity to bring a private action in federal court to enforce the right to a meaningful education under the EEOA is especially critical. Asian Americans are relatively few in number and speak many distinct languages and dialects.[69] The number of Asian American ELLs who speak a particular language in a given state or region may be dwarfed by ELL speakers of other languages, such as Spanish.[70] As a consequence, the educational needs of those Asian American ELLs may be overlooked, even in a school or school district

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[68] *Newark Parents Ass'n v. Newark Pub. Sch.*, 547 F.3d 199, 212 (3d Cir. 2008); *see, e.g., Doe v. Westerville City Sch. Dist.*, No. 2:07-cv-00683, 2009 WL 29876, at 2 (S.D. Ohio Jan. 5, 2009) (finding that NCLB "provides no express procedure by which individuals may enforce its requirements."); *Fresh Start Acad. v. Toledo Bd. of Educ.*, 363 F. Supp. 2d 910, 916 (N.D. Ohio 2005) (finding that by committing NCLB enforcement to the Secretary of Education, "Congress did not intend to provide for piecemeal enforcement by individuals across the country."); *Ass'n of Cmty. Orgs. for Reform Now v. New York City Dep't of Educ.*, 269 F. Supp. 2d 338, 342 (S.D.N.Y. 2003) (noting that the "Penalties" section of NCLB "contains no procedure for parents or students to seek judicial, administrative, or any other remedies for alleged noncompliance with the dictates of the [NCLB].").

[69] *See* U.S. Census Bureau, CENSR-17, *We the People: Asians in the United States* 11 (2004); *see also* U.S. Census Bureau, C2KBR/01-16, *The Asian Population: 2000* 5, 9 (2002).

[70] *See* Anneka L. Kindler, Nat'l Clearinghouse for English Language Acquisition & Language Instruction Educ. Programs, *Survey of the States' Limited English Proficient Students & Available Educational Programs & Services, Summary Report* 20-22 (2002); *see also Left in the Margins, supra*, at 4-5.

that is operating under an education plan approved by the federal DOE under NCLB.[71]

ELL speakers of less common languages historically have relied on the federal courts to protect their rights to an equal education under the EEOA. *See, e.g.*, *Heavy Runner*, 522 F. Supp. at 163 (seeking equal education for ELLs who speak the Blackfoot language). That protection is especially important to Asian American ELLs, among whom ELL speakers of a single language in a particular school district may be too few in number to trigger provisions requiring native language assessment under NCLB-approved state plans that look to statewide numbers.[72]

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[71] *See* Darnell Little & Azam Ahmed, *Struggling Asians Go Unnoticed, Poor Grades Lumped in with Standout Students*, Chicago Tribune, Mar. 30, 2008, at C1; *see also United States v. Texas*, 572 F. Supp. 2d 726, 766 (2008).

[72] *See, e.g.*, *Left in the Margins*, *supra*, at 4 (noting that although 19.9 percent of ELLs in New York City speak one of five Asian languages, no single Asian-language-speaking ELL group meets New York's statewide 10 percent threshold for developing and using native language assessments).

CONCLUSION

The judgment of the court of appeals should be affirmed.

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APPENDIX

Amici Curiae in Support of Respondents

Asian American Legal Defense and Education Fund

The Asian American Legal Defense and Education Fund ("AALDEF"), headquartered in New York City and founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF's Educational Equity and Youth Rights Project promotes the rights of Asian American students in kindergarten through 12th-grade public education. AALDEF works in various jurisdictions discussed herein to protect English Language Learner students' right to curricular and programmatic equality, and coordinates the National Asian American Education Advocates Network ("NAAEA Network"). Many of the amici groups listed herein are members of the NAAEA Network.

Advocates for Children of New York

Advocates for Children of New York ("AFC") is dedicated to ensuring access to New York City's best public education services or all students, especially students of color, students from low-income backgrounds, immigrant students, and ELLs. For more than 37 years, AFC has provided a range of direct services, including free individual case advocacy, technical assistance, and trainings, and has worked on institutional reform of educational policies and practices through advocacy and litigation.

Arizona Asian American Bar Association
The Arizona Asian American Bar Association ("AAABA") seeks to provide a vehicle and forum for the unified expression of opinions and positions by its members regarding current social, political, economic, legal, and other issues of concern to Asian Americans, particularly in the state of Arizona. As such, AAABA has an interest in this litigation's impact on Arizona's growing Asian American ELL student population.

Asian American LEAD
Asian American LEAD promotes the well-being of low income Asian American youth and families in Washington, D.C. and Maryland through education, leadership development, and community building. Many of Asian American LEAD's student members are either recent immigrants or children of immigrants, and are often ELLs.

Asian Immigrant Women Advocates
Asian Immigrant Women Advocates ("AIWA"), founded in 1983, empowers low income, limited English proficient Asian immigrant women and youth in Oakland, California to stimulate positive changes in their workplaces, schools, communities, and broader society. AIWA conducts education, leadership development, and collective action, enabling women and youth to fight for dignity and justice in their working and living conditions. AIWA's Youth Build Immigrant Power project develops the leadership capacity of low-income Cantonese speaking immigrant youth and fights to obtain equal access for ELLs in Oakland public schools.

Asian Law Alliance

The Asian Law Alliance ("ALA"), founded in 1977, provides equal access to the justice system to the Asian and Pacific Islander communities in Santa Clara County, California. As an organization that provides legal services to limited English proficient Asian and Pacific Islander immigrants and refugees, ALA is concerned with the adequacy of ELL programs in Santa Clara County public schools and has advocated to expand such programs.

Asian Pacific American Legal Resource Center

The Asian Pacific American Legal Resource Center ("APALRC") advances the legal and civil rights of Asian Americans through direct services, education, and advocacy in Washington, D.C., Maryland, and Virginia. APALRC addresses the legal needs of low income and limited English proficient Asian Americans and advocates for broad-based systemic change concerning their legal and civil rights. Due to APALRC's language access advocacy, APALRC has an interest in protecting the overlooked needs of ELLs and addressing local public schools' failure to provide equal educational opportunity for Asian American ELLs.

Asian Pacific Community in Action

Asian Pacific Community in Action ("APCA") is dedicated to improving the health and well being of the Asian Pacific Islander community in the greater Phoenix area, Arizona. APCA focuses on providing culturally and linguistically appropriate services to Arizona's Asian and Pacific Islander population, and targets its services toward low income immigrants.

APCA has a particular interest in the well being of Asian and Pacific Islander children and youth.

Asian Pacific Islander Legal Outreach

Asian Pacific Islander Legal Outreach ("API Legal Outreach"), founded in 1975, promotes culturally and linguistically appropriate services for the most marginalized segments of San Francisco and Oakland, California's Asian Pacific Islander community. Based on its work on a variety of social justice issues including language, immigrant, and youth rights, API Legal Outreach believes firmly in equal access to education for ELLs.

Asian Pacific Islander Youth Promoting Advocacy and Leadership

Asian Pacific Islander Youth Promoting Advocacy and Leadership ("AYPAL") runs youth identified and youth run direct action organizing campaigns for school and community change to improve the lives of Asian Pacific Islander youth in Oakland, California. Among other things, AYPAL's organizing campaigns have addressed the needs and concerns of Oakland's ELL student population, and many of AYPAL's youth members are current or former ELLs.

Boston Chinatown Neighborhood Center

The Boston Chinatown Neighborhood Center ("BCNC") seeks to enrich and improve the quality of life for Boston, Massachusetts' Asian American community and for residents of Boston's Chinatown, South End, and South Cove communities by providing bilingual education, child care, cultural, social, youth and recreational programs. BCNC serves immigrant youth through ESL classes,

homework help, and leadership and enrichment programs. BCNC believes strongly that Chinese American and other ELLs deserve equal educational opportunities.

Cambodian Association of Greater Philadelphia

The Cambodian Association of Greater Philadelphia ("CAGP") provides social, health, and education programs for Cambodian refugees and their families in Philadelphia, Pennsylvania. CAGP provides innovative and unique bilingual programs to meet the combined academic, social, economic, and health needs of Philadelphia's Cambodian community. Recognizing the importance of public education, CAGP organizes local high school aged youth to speak out concerning their needs and interests in public school.

Center for Pan Asian Community Services, Inc.

The Center for Pan Asian Community Services, Inc. ("CPACS") creates and delivers culturally competent and comprehensive social and health care services to immigrants, refugees, and racial or ethnic minorities in the greater Atlanta, Georgia region. CPACS provides English as a Second Language classes and runs a youth development program tailored toward ELL students. CPACS believes in the importance of comprehensive ELL services to help immigrant and refugee students and families fully integrate into society.

Chinese for Affirmative Action

Chinese for Affirmative Action ("CAA"), based in San Francisco, California, was founded in 1969 to protect

the civil and political rights of Chinese Americans and advance multiracial democracy in the United States. Today, CAA is a progressive voice in and on behalf of the broader Asian and Pacific American community, advocating for systemic change that protects immigrant rights, promotes language diversity, and remedies racial injustice. CAA leads community efforts to improve the quality of education for Asian Pacific American and immigrant students by promoting quality ELL programs, effective language services, and meaningful school integration.

Coalition for Asian American Children and Families

The Coalition for Asian American Children and Families ("CACF"), based in New York City, is the nation's only pan-Asian children's advocacy organization dedicated to promoting the health and well-being of Asian Pacific American children and families. CACF believes that access to quality academic programs and services is vital to strengthening academic achievement and life-long success for ELL students.

Detroit Asian Youth Project

The Detroit Asian Youth Project ("DAY Project") seeks to develop leadership skills in and raise consciousness among Asian American youth in Detroit, Michigan. DAY Project engages youth, some of whom are current or former ELLs, through community-based projects to promote a greater understanding of Detroit and its Asian American community.

Hmong American Partnership

Hmong American Partnership ("HAP") is a social service and community development organization empowering the Hmong community of Saint Paul and Minneapolis, Minnesota. HAP provides culturally sensitive social services as well as housing, community and economic development opportunities, and promotes the Hmong community's rich cultural heritage. HAP works with Saint Paul Public Schools and ELL students who are affected by issues relating to racial, economic, and language disparities.

Multi-Cultural Youth Project

The Multi-Cultural Youth Project ("MCYP"), based in Chicago, Illinois, is a collaboration of youth agencies nurturing and empowering youth to embrace and act upon their potential to transform their lives and communities. Originally founded by the Chinese Mutual Aid Association, MCYP cultivates youth leaders—including current and former ELLs—who stand in solidarity and actively partner with others fighting for local and global social justice. MCYP seeks to equip youth with the life, leadership, and organizing skills to lead healthy lives, build meaningful relationships, and create new ways of addressing community issues.

National Korean American Service & Education Consortium

The National Korean American Service & Education Consortium ("NAKASEC") is a national non-profit organization based in Los Angeles, California with a Washington D.C. office. Founded in 1994, NAKASEC is a multi-issue civil and human rights organization serving the Korean American

community, projecting a national progressive voice for Koreans Americans and promoting their full participation in the United States. To this end, NAKASEC promotes equitable and just changes to this country's political and legislative systems through education, policy advocacy, grassroots organizing, and community mobilization.

ONE Lowell

ONE Lowell is a community-based organization that works to improve the life, opportunities, and civic involvement of culturally diverse people in Lowell, Massachusetts. ONE Lowell is dedicated to increasing the integration and self sufficiency of Lowell's immigrant community by strengthening civic participation, developing strong leadership, and increasing access to vital services. ONE Lowell's School Success for Newcomers Initiative advocates for the interests of ELL students and their families in Lowell's public schools.

Providence Youth Student Movement

The Providence Youth Student Movement ("PrYSM"), based in Providence, Rhode Island, is a Southeast Asian youth-led organization with a clear and passionate vision for social change. PrYSM mobilizes youth members—including current and former ELLs—into organizing campaigns building community-based power for Southeast Asians, and provides services and programming for youth including a General Education Development program for out of school youth.

United Chinese Association of Brooklyn

The United Chinese Association of Brooklyn ("UCA") is the first nonprofit social service agency serving the immigrant Chinese community of Bensonhurst, Brooklyn, in New York City. UCA mobilizes community resources to protect immigrants' civil rights, defend them against discrimination, and provide needed social services. UCA works with AALDEF to organize Chinese immigrants and other ELL students, and advocate for their educational rights in Bensonhurst neighborhood public schools.

Vietnamese American Young Leaders Association of New Orleans

The Vietnamese American Young Leaders' Association of New Orleans ("VAYLA-NO") is a youth led, youth organizing, and youth development community-based organization in New Orleans, Louisiana. VAYLA-NO empowers Vietnamese American and other underrepresented youth—including current and former ELLs—through direct services, cultural enrichment, and social change advocacy.

Washington Asian Pacific Islander Families Against Substance Abuse

The Washington Asian Pacific Islander Families Against Substance Abuse ("WAPIFASA") is a non-profit agency serving Asian and Pacific Islander youth and youth of color in greater Seattle, Washington. WAPIFASA provides culturally competent and age appropriate direct services and social programming for youth—including current and former ELLs—and their families.